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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. RAJESH KUMAR, Defendant and Appellant.	C074620 (Super. Ct. No. SF120277A)

On May 1, 2012, the body of Valida Raynette Irvin was discovered lying on the ground by a dumpster in her apartment complex. A jury convicted her neighbor, defendant Rajesh Kumar, of first degree murder in her death. (Pen. Code, § 187, subd. (a)) and found true the special circumstance of torture for imposition of a sentence of life without parole (Pen. Code, § 190.2, subd. (a)(18)) and that defendant personally used a weapon (Pen. Code, § 12022, subd. (b)(1)). Defendant was sentenced to life without parole, plus one year for use of the weapon.

On appeal, defendant principally contends that the trial judge's oral instructions to the jury on various matters—none of which drew an objection from defense counsel—

lessened the prosecution's burden to prove the charges against defendant beyond a reasonable doubt. Defendant also contends that the prosecutor committed misconduct by suggesting that defense counsel conceded in closing argument that defendant murdered Ms. Irvin by arguing alternatively for a second degree murder verdict and the trial court likewise committed misconduct by a remark suggesting defense counsel did not believe his client's testimony. Defendant further contends he was entitled to an additional day of credit for time served in custody.

We reject these contentions and affirm the verdict. However, defendant further contends, and the Attorney General agrees, that the trial court erred in imposing a parole revocation fine because defendant was sentenced to life without the possibility of parole. That fine will be stricken.

FACTS

Evidence of the Crime

On the evening of April 30, 2012, Ms. Irvin had a number of telephone calls with family members. Ms. Irvin spoke to her cousin, Bobbie Rose, at about 7:30 p.m. Ms. Irvin told Bobbie Rose she was tired and going to bed, because she had to get up early to go to work the next day. Ms. Irvin had called to find out if Bobbie Rose could take her to work. Ms. Irvin owned a 1992 red Toyota Celica but didn't drive; her license had been suspended when she had a seizure while driving.

The same day Ms. Irvin called her mother, Aurilla Curtis, between 8:00 and 8:30 p.m. It was a brief conversation because Ms. Irvin said her neighbor had lost his stepfather and needed someone to talk to. At about 8:40 p.m., Ms. Irvin's sister, Della Beverette, also spoke on the phone with Ms. Irvin, who reported that her neighbor had come over. She was going to console him for the loss of his stepfather and they were going to drink some wine.

Around 9:00 or 9:30 that night, Roberto Centeno was sitting in his car in the parking lot of Ms. Irvin's apartment complex waiting for a friend. Mr. Centeno saw defendant, whom he knew as a neighbor, and a woman passing close by. Defendant was walking a bike. The woman was tall and thin and had shoulder-length brown hair. (Ms. Irvin was five feet six, weighed between 126 to 136 pounds, and had shoulder-length brown hair at the time.) The woman was walking normally but the man was walking from side to side—"tumbling with his bike," according to Mr. Centeno.

At about 10:00 or 10:30 p.m. on April 30, 2012, David Paniagua, who lived upstairs from defendant, was trying to sleep when he heard a woman scream, "Somebody help me," and a door close. The scream sounded like it was coming from the apartment underneath. Startled awake, Mr. Paniagua looked outside but didn't notice anything. He got back in bed and heard two people arguing in the apartment below him.

On the evening of April 30, 2012, Cindy Wilson, who lived next door to defendant, was falling asleep when she heard a door open so forcefully it shook her window, and a woman's voice screamed, "Somebody fucking help me!" A man's voice in the background said, "Shh, come here," and the door was forcefully closed. Ms. Wilson fell back asleep but woke up later and looked out her window, which was bright red like a car was backing up.

In surveillance video of Ms. Irvin's apartment complex at 1:25 a.m. on May 1, 2012, a person appears wearing a white t-shirt and dark, two-tone shorts walking away from defendant's apartment. At 1:29 a.m., a small compact car is seen driving in reverse to the area where there are removable red posts in front of defendant's building. At 1:30 a.m., the car's brake lights illuminate the poles. The driver—who appears to be the same person previously seen on the video—turns off the car's headlights, exits the vehicle, and walks towards defendant's apartment. At 1:40 a.m., an individual wearing a gray, hooded sweatshirt and dark shorts starts shaking the pole, trying to dislodge it. The person then gets in the car and backs over the pole. The car reverses down the walkway

towards defendant's apartment. At 2:01 a.m., the car is seen traveling over the grass and walkway down to the parking lot and out of view. At 2:02 a.m., video from a different camera shows a red compact car turning toward the dumpster where Ms. Irvin's body was found. The car parks, the front door opens, and a person walks around to the trunk of the car. The video does not show what the individual is doing for about five minutes. At 2:08 a.m., the person gets in the car and drives toward the parking lot exit.

On May 1, 2012, Kamaljit Sidhu, who lived in an apartment upstairs from defendant at the time and had greeted him a couple of times, awoke when a car alarm went off. She testified that the approximate time was 2:00 a.m. She looked out the window and saw a two-door red car parked with the trunk facing defendant's apartment. Ms. Sidhu saw defendant, wearing boxers and a gray sweatshirt, running around the car, opening and shutting the car door, and trying to turn off the alarm. Ms. Sidhu then saw defendant go back in his apartment, come out, pace back and forth near the stairs, return to the car, and walk around to look for something, at which point the alarm went off again. Defendant went back in his apartment and came out wearing blue latex gloves. Ms. Sidhu estimated she watched defendant for 20 or 25 minutes. Ms. Sidhu went into another room in her apartment and saw the car leave.

On May 1, 2012, Gurgeet Sangha was working a late shift at a 7-Eleven about a half-mile from Ms. Irvin's apartment complex. Mr. Sangha estimated that between 1:30 and 2:30 a.m., defendant, who had been in the store before and chatted with Mr. Sangha, came in with bloody knees, wearing shorts but no shoes. Mr. Singha told defendant that he was not allowed in the store without shoes, and defendant said he had fallen from his bike and hurt his knees. Defendant wandered around the store, bought some pumpkin seeds, and left. Defendant did not show any distress or ask for help or to use the phone to call 911.

In surveillance video from the 7-Eleven on May 1, 2012, at 2:31 a.m., Mr. Sangha is seen and a barefoot person wearing a white t-shirt and black shorts, who appears to be

defendant, enters the store.[1] The person walks through the store and engages in conversation with Mr. Sangha. By 2:36 a.m., the person has left the store.

At 2:42 a.m. on May 1, 2012, a person dressed the same as the individual on the 7-Eleven video appears on surveillance video at defendant's and Ms. Irvin's apartment complex. The person walks down a path to a pedestrian gate to the complex. At 2:43 a.m., the person uses a key to get in the pedestrian gate. At 2:44 a.m., the same person walks through the parking lot and down the walkway to defendant's apartment. At 2:52 a.m., the person appears on the video carrying a white bag and walking in the direction of the dumpster. At 2:54 a.m., the person appears again and heads in the direction of defendant's apartment, no longer carrying the bag. At trial, defendant confirmed that he was the person on the surveillance video disposing of the bag.

At about 3:30 a.m. on May 1, 2012, Megan Doerr returned to her apartment complex about a mile from Ms. Irvin's complex and found a red Toyota Celica parked in her assigned spot. Ms. Doerr notified the manager the next day and the vehicle was towed away. At trial, Ms. Doerr testified that the vehicle appeared to be similar to a photo of Ms. Irvin's car. Forensic examination of Ms. Irvin's car found blood on the driver and passenger sides of the car, including blood on the passenger seat and window.

On May 1, 2012, at about 7:00 a.m., Rosario Maldonado, who lives in Ms. Irvin's apartment complex, told her daughter to throw away some garbage in the dumpster. She heard her daughter exclaim, "Oh, man," and Ms. Maldonado saw the nude body of a woman lying on the ground. The body was later identified as Ms. Irvin.

An autopsy by Dr. Venus Azar revealed that Ms. Irvin suffered, among other injuries: a five-and-half-inch wound to her neck caused by a sharp-edged object like a knife; other incisions at the corner of her mouth; bruising on the entire right side of her

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[1] During the investigation, a police detective determined that the time stamp on the 7-Eleven video was 13 minutes slow. The time set forth above is adjusted for the error.

face, including a black eye; a broken nose; lacerations to her upper lip; a cluster of 15 punctures between her nose and mouth; a citrus fruit peel inserted deep in her mouth while she was alive that would have obstructed her breathing; multiple bruises and abrasions on her chest, shoulders and around both breasts; multiple rib fractures; contusions and abrasions to both legs; multiple scratches, abrasions, and bruises on both hands and arms; abrasions and lacerations on her knuckles, which could have been defensive injuries; and an injury to the left wrist that could have been caused by a ligature. Dr. Azar noted that Ms. Irvin had blood in her stomach, which she likely swallowed from her injuries.

Dr. Azar determined that Ms. Irvin's death was due to multiple traumatic injuries that would have caused extreme pain, concluding "[t]his woman was beaten to death."

Investigating officers found blood on the dumpster nearest Ms. Irvin's body and nearby a piece of clear tape with dried blood and hair on it. In another dumpster, a detective found a key fob used to open a car and more pieces of tape similar to those found at the other dumpster. In that dumpster, a plastic bag was found containing pieces of bloodstained clear tape with black hairs attached, as well as pajama bottoms, a tank top, a pillow case, and rags—all bloodstained—and some cut-up pieces of citrus fruit. At trial, defendant confirmed that Ms. Irvin was wearing the pajama bottoms and top that night and that he put these items and the fruit in the bag in his living room and carried it to the dumpster, as shown on the surveillance video. A detective also found an empty bleach container in one of the dumpsters.

In commencing a search of defendant's apartment, officers smelled bleach coming from inside.[2] In the bathroom, which smelled heavily of bleach, there was a rug in the

[2] Detectives initially searched defendant's apartment without a warrant when he was arrested on May 1, 2012, out of concern that the as-yet unidentified victim might be his

bathtub with dirt, grass, and leaves on it. The bathtub also contained a white t-shirt and a pair of black underwear that were soaked. There was blood in an area next to the sink and blood by the drain at the base of the sink.

In defendant's bedroom, latex rubber gloves with blood on them matched to Ms. Irvin's DNA were found in a dresser drawer. One of the bedroom closets contained open plastic containers of bleach. There was a clothes hamper containing shorts that appeared to have blood on one of the legs and rolled up socks that were wet with a substance that tested positive for blood.

In a backpack in the bedroom closet, officers found two buffalo nickels dated 1923 and 1937, two dimes dated 1961 and 1963, a 1972 silver dollar, and a 1976 half dollar. There was a 1973 mint set in the closet.

Ms. Beverette testified that Ms. Irvin had recently picked up coins that their deceased father had collected. Ms. Rose testified that Ms. Irvin had said she would never sell her father's coins and would die before somebody got them. Ms. Rose identified a bag of coins found in a backpack in defendant's apartment as a bag she had seen in Ms. Irvin's apartment.

Officers also collected many items of jewelry in defendant's apartment, including a pendant with the letter "R" on it found in a backpack in defendant's closet. Ms. Beverette testified that the pendant looked like her sister's, which had an "R" on it for Raynette. Ms. Beverette had similar one with a "D" for Della; the pendants were gifts from their mother. Ms. Rose identified photographs of a necklace and ring found in defendant's bedroom and a ring found on his dining table as jewelry that Ms. Irvin would wear.

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ex-wife, who had custody of their two children. Police later returned with a warrant to search defendant's apartment more extensively.

In the living room, which also smelled of bleach, a detective found a roll of packing tape like that found near the dumpster. The coffee table was pushed up against the couch. There was a throw rug covering a portion of the carpet that was wet and discolored. Areas underneath the rug were bleached and tested positive for blood. What appeared to be blood was on the coffee table. There was a blood spatter on one wall. A black shoelace or cord was hanging on the living room wall above the couch. There was a similar-looking cord found during the search of the dumpsters. DNA testing of a folding knife found on top of the VCR determined that blood on the blade profiled Ms. Irvin as the major contributor, while defendant was the major contributor to blood on the handle.

In the dishwasher in the kitchen, officers found a double-edged, serrated knife with a nine-inch blade bent at the tip. DNA testing determined that Ms. Irvin was the major contributor to blood on the blade and defendant was the minor contributor, while blood on the handle came primarily from defendant but also from Ms. Irvin. DNA testing of clippings from Ms. Irvin's finger nails on her right hand also revealed a mix of Ms. Irvin as the major contributor and defendant as the minor contributor. There were a pair of blue latex gloves crumpled up in a garbage bag and a box of blue latex gloves under the sink in defendant's apartment.

On May 1, 2012, after the initial search of defendant's apartment, detectives went to Ms. Irvin's apartment. Items in the bedroom had been taken out of the closet and clothes were on the floor and the bed. The drawers of jewelry boxes were opened and emptied on the bed. Dresser drawers were open. In the living room, the couch was turned over, a purse had been emptied, and everything was strewn about. It appeared that someone had ransacked the apartment.

On May 1, 2012, defendant was taken to a local hospital for a sexual assault examination. He had no injuries to his face, head or neck, but did have multiple abrasions and bruises on his extremities that the examining nurse concluded were recent.

He had an apparent bite mark on his right arm. Scrapings from under his fingernails on his right hand found Ms. Irvin's DNA. No evidence of sexual activity was obtained from the examination of defendant. Swabs of Ms. Irvin's genital area tested negative for seminal fluid, except for a single spermatozoon.

Defendant's Testimony

Defendant testified at trial and gave the following account of the events.

Defendant moved from India to the United States in 1998 and became a citizen in 2002. Defendant lived in an apartment near Ms. Irvin's. Defendant earned a living partly by selling things at the flea market.

Defendant met Ms. Irvin in 2010; they were good friends but not involved romantically. They would hang out smoking, drinking, and talking. Defendant visited Ms. Irvin in her apartment many times and she sometimes visited him in his apartment to watch movies.

Ms. Irvin knew defendant sold things at the flea market, and, about two weeks before her death, she gave defendant some books, shoes, old coins, rings, and costume jewelry to sell there, with the understanding they would split the proceeds. He put the items in a backpack. Ms. Irvin also gave defendant a pendant with the letter "R" for a jeweler he knew at the flea market to fix.

At about 5:30 p.m. on April 30, 2012, defendant went to Ms. Irvin's apartment to ask her to give him a ride to the flea market early the next morning, and she agreed. They smoked and drank wine for 20 or 30 minutes. Defendant left her apartment on his bike to get take-out chicken, but his bike had no brakes and he fell and scraped his hands and legs on the way home.

At about 9:00 p.m., defendant went back to Ms. Irvin's apartment to load the flea market items in her car. Ms. Irvin suggested they go to see if the boxes would fit in her car. Defendant confirmed that he and Ms. Irvin walked by Mr. Centeno, arriving at

defendant's apartment at about 10:00 p.m. Ms. Irvin looked at the boxes and thought they would fit in her car. They sat on the couch to watch a movie, then went outside to smoke, and returned to finish the movie, leaving the door open.

About 20 or 30 minutes later, someone named Mike came in. Defendant knew that Ms. Irvin had two or three boyfriends named Mike but didn't know which one this was. Mike was very angry and his eyes were red. Mike and Ms. Irvin were yelling at each other about being stood up and cheating; they were talking fast and defendant couldn't understand. Both Mike and Ms. Irvin indicated to defendant not to interfere. Defendant decided to leave them alone and went into the bathroom, where he could hear them yelling.

About five minutes later, defendant came back out when he heard, "Oh, my God," and saw that Ms. Irvin's nose and mouth were bleeding. Defendant got Mike in headlock and asked why he hit Ms. Irvin. The two wrestled and Ms. Irvin told defendant to let Mike go. When defendant didn't let go, Ms. Irvin bit him on the right arm. Defendant asked Ms. Irvin why she bit him when he was trying to help her. Defendant told Ms. Irvin and Mike he was going outside while they did what they were going to do, and then they should leave his apartment. Defendant walked to his mailbox and around the apartment complex smoking cigarettes and came back to sit on the stairs by his apartment.

Defendant heard someone saying, "Help. Help me. Raj, Raj, help me. Somebody fucking help me." Defendant went back in the apartment and saw Mike holding a big hunting knife serrated on one side. Mike was holding Ms. Irvin; she was nude and had tape over her mouth. Mike cut her throat and she fell to the ground. Ms. Irvin was bleeding on the rug and carpet. Defendant froze because he was scared. Mike said that defendant or his family would be next if he didn't listen. Defendant was on his knees crying and saying there was nothing between Ms. Irvin and him. Mike poked defendant in the stomach with the knife.

Mike said that he would take Ms. Irvin's body with him and told defendant to get a box. Defendant testified that Mike had a small gun in one hand and the knife in the other. Defendant got a large storage box he had for flea market items. Mike told defendant to put Ms. Irvin's body in the box, but the body was slippery and heavy. Defendant asked if he could get his blue gloves from the kitchen and both defendant and Mike put them on. Defendant did what Mike told him to do because defendant was scared—Mike had a gun and a knife. With some trouble, defendant got the body in the box.

Mike asked defendant if he had a car and defendant said it was in the shop, so Mike told defendant to get Ms. Irvin's car. Defendant went to Ms. Irvin's apartment and got the car key. He didn't see Mike following him but he thought he saw a "shadow" behind him. In Ms. Irvin's apartment, defendant saw the couch was overturned and her purse was dumped out on the floor.

Defendant acknowledged that he was the person on the video walking to his apartment and driving her car up to the post. Defendant testified that it was in his mind at the time what his boss at Jack in the Box had told him: in case of a robbery at gunpoint, don't be a hero. Defendant stopped at the post, which was locked, and Mike came from behind an electrical box and told defendant to drive over the pole, which he did. Defendant also testified Mike was by the laundry with the gun. Mike told defendant to get the box. The box was too heavy to lift and defendant had to slowly push it out the door and across the grass. Mike did not help—even though he was wearing gloves, he did not touch anything. The car was too small for the box to fit but Mike told defendant to lay the passenger seat flat, and defendant was able to get the box in the passenger seat. Defendant did not try to run because Mike was watching him and had a gun.

Defendant testified that the person Ms. Sidhu saw was Mike, who was wearing a gray sweatshirt while defendant was wearing a white t-shirt. Defendant further testified that Ms. Sidhu could not see his face. Defendant acknowledged that Mike had a ponytail

and didn't look anything like him. Defendant testified that Ms. Sidhu was lying when she said she saw defendant with gloves on running around the car with the alarm going off.

After defendant got Ms. Irvin's body in the car, Mike jumped in the back seat and told defendant to drive. Defendant confirmed that he was the one shown driving the car on surveillance video. Defendant drove past the garbage containers and Mike told him to back up and take the body out. Mike stayed in the car behind defendant. Defendant took the box with the body in it out and left just the body.

Mike told defendant to drive. Defendant drove out the gate. Mike told defendant to make a right turn, but he was nervous and turned left. Mike cursed defendant and he made a U-turn back past the 7-Eleven. Mike told defendant to open the door and pushed him out of the driver's seat from the back seat. Defendant fell and injured his knees. Mike drove off and disappeared.

Defendant went to the 7-Eleven. Defendant had no slippers; they had come off when he was pushed out of the car.[3] Defendant knew an Indian man who worked at the 7-Eleven and was going to tell him what happened, but defendant was afraid Mike would make a U-turn, see defendant with a phone, and shoot him. Defendant testified that he did not have his cell phone with him at the time. Defendant testified that he had the keys to Ms. Irvin's car.

Defendant left the 7-Eleven and went to his apartment. He acknowledged that he was the person seen on surveillance video entering the gate with a key. Defendant looked at his apartment and saw the tape with blood on it, Ms. Irvin's clothes by the couch, and big blood spots. Defendant was scared that, if his neighbors came to his apartment after

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[3] The detective who interviewed defendant after he was detained testified that defendant stated Mike simply ordered him out of the car and said nothing about being pushed or losing his shoes (he claimed the shoes were at his apartment).

hearing the yelling earlier and saw the blood and the body by the dumpster, they would think defendant did it.

Defendant saw the serrated kitchen knife underneath the coffee table, picked it up, cleaned it with the clothes, and put it in the dishwasher. Defendant denied that Mike used this knife. Defendant testified he picked up the rug and put it in the bathtub, so no one could see the blood on it, and rinsed it with water. Defendant also testified he washed the carpet with bleach in the living room where the killing occurred. Defendant cleaned his carpets because he was scared his neighbors would see the blood spots and blame him.

Defendant put the pajamas, shirt, and tape in a bag from his kitchen and put it in the dumpster. Defendant acknowledged that he was the person shown on video surveillance carrying the bag. Defendant explained that he had the clear packing tape found in his apartment to pack items for the flea market. Defendant acknowledged that he put the folding knife on the VCR after he came back from the 7-Eleven but denied that the knife was his.

Defendant testified repeatedly that he did not hide anything.

Defendant testified he was not drunk when the homicide happened. He drank a small glass of wine with Ms. Irvin at 5:00 p.m. and one glass at 9:00 or 10:00 p.m. when they walked to her apartment.

Defendant testified that "[t]omorrow or later" he would have told what happened, because cameras were everywhere and the police would find out. He found his cell phone but did not use it to call the police. Instead, he cleaned up and thought about calling a family member or the police. Then defendant took two or three sleeping tablets and drank some wine. Defendant had three cups of alcohol that night. When he opened his eyes, the police were yelling for him to open the door. It took a little while for him to wake up because of the sleeping pills.

Defendant claimed he was allergic to lemons, did not have any citrus in his house, and never eats oranges or citrus fruit. Detectives found oranges in a rice cooker and in the bottom drawer of the refrigerator in defendant's apartment.

Additional Evidence in Support of the Defense

Ms. Irvin's work supervisor testified that Ms. Irvin had a full-time work schedule but was often absent and did not come to work for a few days before her death.

A co-worker testified that Ms. Irvin was a heavy drinker and that, a few months before her death, Ms. Irvin said she had met an Indian man in her apartment complex who was nice and they would sit outside smoking and talking. Ms. Irvin said not to tell anyone about him because he had a wife and kids.

Defendant's ex-wife testified that she had gone with defendant to the flea market to sell things and he had a lot of jewelry to sell, but mostly he went to the market by himself. She testified that defendant had a drinking problem, which is why they got divorced. She testified that when defendant drank he acted crazy, throwing food and watching the television too loud. Afterwards, he would sometimes forget what he had done. Defendant never touched her in an angry or mean way. Defendant and his ex-wife had a home and business but lost them and defendant's drinking got worse.

Prosecution's Rebuttal Evidence Regarding Ms. Irvin's Former Boyfriends

The prosecution called two witnesses named Mike who had dated Ms. Irvin: Mike Hodges and Michael Brooks.

Mr. Hodges testified that he had dated Ms. Irvin for about a year and a half and the relationship ended seven or eight years ago. Afterwards, they spoke on the phone from time to time; the last time was November or December 2011. Mr. Hodges never met defendant.

Mr. Brooks met Ms. Irvin in 2005 and they dated on and off for about four years. After that, Ms. Irvin used to call him a couple times a month. He last saw her a couple months before her death. Mr. Brooks never met defendant.

DISCUSSION

CALCRIM Instructions

1. CALCRIM No. 220

Defendant contends that the trial judge made comments in the course of orally giving the pattern instruction defining proof beyond a reasonable doubt, CALCRIM No. 220, that had the effect of lowering the prosecution's burden of proof. We disagree.

The written version of CALCRIM No. 220 given to the jury states in relevant part: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt."

In orally instructing the jury with CALCRIM No. 220, the trial judge stated: "A Defendant in a criminal case is presumed to be innocent. This presumption requires the People to prove a Defendant guilty beyond a reasonable doubt. And that's the whole point to a trial, isn't it? Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. Now, here's the definition. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. That's the only definition I can give you under the law. [¶] The only expansion would be, well, what's abiding? That means a lasting conviction, not something where it's, you know, two minutes to 4:00 and you say, okay, I think that's how I feel, I might change my mind at 4:10, okay. But you have a lasting conviction. That's how you feel, having looked at the evidence. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt."

Defendant contends that the trial judge's explanation that an "abiding conviction" is a "lasting conviction," and not something that jurors would change their mind about between "two minutes to 4:00" and "4:10," lowered the prosecution's burden of proof. Defendant further argues that the court erred in describing "an 'abiding' conviction as solely a function of time." We reject both contentions.

In *People v. Wilson* (2008) 44 Cal.4th 758 (*Wilson*), the California Supreme Court summarized the principles applicable to written and oral jury instructions that diverge: "We of course presume 'that jurors understand and follow the court's instructions.' [Citation.] This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control. [Citations.] When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. [Citations.]" (*Id.* at pp. 803-804; see also *People v. Grimes* (2016) 1 Cal.5th 698, 729 (*Grimes*) [" '[W]e often have held that when erroneous oral instructions are supplemented by correct written ones, we assume the jury followed the written instruction, particularly when, as here, the jury is instructed that the written version is controlling.' [Citations.]"]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 823, fn. 6 [" ' "It is generally presumed that the jury was guided by the written instructions." ' [Citation.] 'Consequently, as long as the court provides accurate written instructions to the jury to use in deliberations, no prejudicial error occurs from deviation in the oral instructions.' [Citation.]"].)

Before deliberations, the trial court provided a copy of the written instructions to each juror and instructed the jury that "[t]he instructions may be typed, printed or handwritten. . . . Certain sections may have been crossed out or added. Disregard any deleted section. . . . Consider the final version of the instructions in your deliberations."

The written version of CALCRIM No. 220 contained only the term "abiding conviction" and the jury was instructed to apply this version in its deliberations. Thus, there is no reasonable likelihood that the jury applied CALCRIM No. 220 in an impermissible manner. (*People v. Edwards* (2013) 57 Cal.4th 658, 746.)

Even assuming the jury did not understand that the written instructions were controlling, defendant overstates the difference between "abiding" and "lasting" in modifying the term "conviction." Several courts have used the term "lasting" in describing "abiding." In *People v. Zepeda* (2008) 167 Cal.App.4th 25, the court explained that "[t]he modifier 'abiding' informs the juror his conviction of guilt must be more than a strong and convincing belief. Use of the term 'abiding' tells the juror his conviction must be of a 'lasting, permanent nature,' it informs him 'as to how strongly and *deeply* his conviction must be *held*.' " (*Id.* at pp. 30-31, quoting *People v. Brigham* (1979) 25 Cal.3d 283, 290-91 (italics added by *People v. Zepeda*).)

In *People v. Pierce* (2009) 172 Cal.App.4th 567, 573, the court observed that "[t]he United States Supreme Court and the California Supreme Court, respectively, have described 'an abiding conviction' as one that is 'settled and fixed' [citation] and one that is 'lasting [and] permanent' [citation]." (See also *People v. Light* (1996) 44 Cal.App.4th 879, 885 [" 'abiding conviction' " adequately conveys "the requirement that the jurors' belief in the truth of the charge must be both long lasting and deeply felt"].)

To the extent defendant maintains that "abiding" conveys a sense of "permanence" but "lasting" does not, the dictionary does not support him. The dictionary sets forth the following as synonyms: "LASTING, PERMANENT, DURABLE, STABLE" which "mean enduring for so long as to seem fixed or established." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 702, col. 1.) Thus, there was nothing in the court's use of the term "lasting" in explaining proof beyond a reasonable doubt that would lead jurors to conclude that their belief in defendant's guilt must be anything less than "abiding."

As for the court's brief illustrative comment that a "lasting conviction" is not one upon which a juror could make up his or her mind at "two minutes to 4:00" and change by "4:10," we do not find, as defendant argues, that the court described an "abiding conviction" as "a belief that is something more than fleeting -- something that can last more than 12 minutes," as opposed to a conviction that is " 'settled and fixed,' 'lasting' and 'permanent.' " Rather, the court merely illustrated that an "abiding" or "lasting" conviction is not one that is changeable but enduring and continuing. (See Merriam-Webster's Collegiate Dict., *supra*, p. 2, col. 2 [defining "abiding" as "enduring, continuing"].) Indeed, the court concluded this illustration with the declaration that the jury "must have a lasting conviction." The term "LASTING implies a capacity to continue indefinitely." (*Id.* at p. 702, col. 1.)

Finally, defendant's contention that "[i]t was also error for the court to describe an 'abiding' conviction as solely a function of time" is not well taken. The term "lasting"—or "abiding," for that matter—cannot be read in isolation. (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1299.) These words modify the term "conviction" and taken together inform jurors of the degree of conviction necessary to find a defendant guilty beyond a reasonable doubt. (*Ibid.*) An "abiding" or "lasting" conviction is a strongly held belief that will endure indefinitely.

However, we agree with defendant and the Attorney General that a trial court should exercise caution in expanding on pattern instructions, even orally. In *People v. Freeman* (1994) 8 Cal.4th 450, the California Supreme Court did not find error in the trial court's slight modification to the then-standard instruction on reasonable doubt but noted that appellate courts had "long cautioned against 'an impromptu instruction on reasonable doubt.' [Citations.]" (*Id.* at p. 503.) The court explained that "varying from the standard is a 'perilous exercise.' [Citation.]" (*Id.* at p. 504.) Accordingly, the court

stated it would "continue to caution against trial court experimentation . . . ." (*Ibid.*) We do so as well, even orally.[4]

2. CALCRIM No. 625 and CALCRIM No. 362

The trial court instructed the jury with CALCRIM No. 625, the pattern instruction on voluntary intoxication in homicide cases, and CALCRIM No. 362 on consciousness of guilt arising from a defendant making knowingly false statements. Defendant contends that this was error because CALCRIM No. 625 as written prohibited the jury from considering voluntary intoxication to rebut the charge that he knowingly made false statements. Similarly, defendant claims this instruction kept the jury from considering voluntary intoxication as an explanation for his implausible behavior the night Ms. Irvin was murdered, which would bolster his credibility in presenting his version of the events. Lastly, defendant contends CALCRIM No. 625 is overbroad and violates due process by excluding relevant exculpatory evidence.

The trial court instructed the jury per CALCRIM No. 625 that "[y]ou may consider evidence, if any, of the defendant's voluntary intoxication only in limited way in this murder case." The jury was instructed to consider such evidence only in determining defendant's (1) intent to kill, (2) premeditation, (3) intent to inflict pain to prove torture in first degree murder, (4) intent as required to prove the special circumstance of torture, and (5) under a felony murder theory, intent or mental state to commit burglary by theft,

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[4] What makes the exercise so perilous is the susceptibility of most words to tortured constructions by those intent on finding ambiguity. Once a given formulation meets the approval of the courts as a clear statement of legal principle, it should be used without adornment no matter the eloquence of the trial judge-editor. Otherwise, appellate judges are compelled to expend precious time explaining why the wordsmithing does no harm to the essential meaning of the instruction or worse, why the sincere effort to add additional clarity has fallen short and requires a trial to be done over. Fortunately, in this case, the trial court's effort may have added no clarity but it did not alter the essential meaning of the approved instruction.

attempted rape, or robbery. The instruction concluded with the statement that the jury "may not consider evidence of voluntary intoxication for any other purpose."

With respect to CALCRIM No. 362, the court instructed in relevant part, that "[i]f the Defendant made a false or misleading statement before his trial relating to the charged crime knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime, and you may consider it in determining his guilt."

Defendant acknowledges that evidence of voluntary intoxication was not admissible to excuse his criminal behavior or to mitigate his culpability but insists that it was admissible to rebut the prosecution's claim that he knowingly displayed a consciousness of guilt by making false and misleading statements. It was also relevant in assessing the credibility of his account of his actions on the evening in question. He asserts in substance that the behavior of an intoxicated person is not that of a sober person and a jury, properly instructed, could have concluded that he gave a truthful account of his bizarre actions, implausible though they might seem. Without modification to limit its scope to the mental elements of charged offenses, CALCRIM No. 625 is overbroad and violates due process by excluding relevant exculpatory evidence.

Defendant relies on *People v. Wiidanen* (2011) 201 Cal.App.4th 526 (*Wiidanen*) in which we considered CALCRIM No. 362 given together with CALCRIM No. 3426, the general instruction on evidence of voluntary intoxication. We held that the court erred in giving CALCRIM Nos. 362 and 3426 together because the former instruction allowed the jury to infer defendant's consciousness of guilt if the defendant made knowingly false statements about the charged crime (oral copulation with unconscious person), but the latter instruction prohibited the jury from considering defendant's voluntary intoxication for any purpose other than whether defendant knew the victim was unconscious at the time. (*Wiidanen, supra*, at p. 533.) "This prohibition was error because a defendant's false or misleading statements made when he was intoxicated may not be probative of the

defendant's veracity, if the jury believed the defendant was too intoxicated to know his statements were false or misleading." (*Ibid.*)

In *Wiidanen*, the statements in question were made while defendant was intoxicated: "[D]efendant made various statements to police a few hours after the incident that were false, even under defendant's theory of the case at trial. He repeatedly told police he did not orally copulate anybody at the party. If the jury believed that defendant made false statements such as these to the police, *it should have been allowed to consider whether he was intoxicated at the time he made those false statements and whether his intoxication prevented him from knowing those statements were false*. If the jury so believed, those statements would not have been probative of defendant's consciousness of guilt." (*Wiidanen*, *supra*, 201 Cal.App.4th at p. 533, italics added.)

Defendant made a number of false, misleading and inconsistent statements to police when he was interviewed, beginning on May 1, 2012, and carrying over into May 2, 2012. For example, the interviewing detective testified that, among other things, defendant stated that the victim's name was "Christina or something like that," so that police, who initially thought the victim was defendant's ex-wife, did not at first know who the victim was. Defendant also told police that Mike simply ordered him out of the car and said nothing about being pushed and bloodying his knees, as he testified at trial. Defendant did not tell police he lost his shoes but claimed they were in his house, another statement inconsistent with this trial testimony. Defendant made these false and misleading statements, but unlike *Wiidanen*, there is no indication that defendant was intoxicated when the statements were made.[5] Nor for that matter, according to his own testimony, was he intoxicated at the time of the homicide.[6]

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[5] The interviewing officer testified that "[t]he tone of the interview was really quite calm. It was really a conversation." (*Huerra v. Busby* (E.D. Cal., July 28, 2014, No. 1:11-cv-001911-SKO-HC) 2014 U.S. Dist. Lexis 103065, p. *32 [rejecting

Recognizing his case is different from *Wiidanen*, defendant proposes an alternative theory is that "[f]alse statements about an event, coming from a person who was drunk [at] the time that the event took place, do not necessarily show consciousness of guilt. If an intoxicated person has a distorted recollection of events, due to his intoxication, not knowing that his recollection is inaccurate and with no intent to deceive, his false or inaccurate statements would not reflect a consciousness of guilt."

Defendant cites no case so holding and we have found none.[7] However, Defendant's ex-wife testified that after drinking defendant sometimes forgot what he did the night before. The effect of intoxication on perception and memory is a proper consideration for the jury. (*People v. Salladay* (1913) 22 Cal.App. 552, 555 ["That a

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contention that CALCRIM No. 625 precluded the jury from evaluating reliability of defendant's statements to police officers, in part because officers "testified that [defendant] was coherent and responded appropriately to the questions posed"].)

6 The circumstances in this case are not comparable to those in *People v. McGehee* (2016) 246 Cal.App.4th 1190, where we held that CALCRIM No. 3428 on mental disease, defect or disorder did not allow the jury to consider defendant's mental disturbance in determining whether his false statements following a murder were knowingly false and evidenced consciousness of guilt. (*McGehee, supra*, at p. 1204.) Mental illness can have a continuous effect on a defendant's knowledge of circumstances and events when making allegedly false statements. Voluntary intoxication may affect a defendant's formation of knowledge of falsity when he or she is intoxicated, not sober.

7 Defendant cites cases besides *Wiidanen* on the relevance of evidence of a defendant's voluntary intoxication that involve intoxication at the time of the conduct at issue (here statements that reflect consciousness of guilt). (*People v. Reyes* (1997) 52 Cal.App.4th 975, 985-986 [evidence that defendant was intoxicated with drugs at the time of receiving stolen property was admissible regarding whether he knew the property was stolen]; *People v. Foster* (1971) 19 Cal.App.3d 649, 656 [failure to give voluntary intoxication instruction regarding the knowledge element of heroin possession held harmless in view of evidence "that belies the claim that he was too drunk to know that the substance he was carrying in the balloon was a narcotic"]; *People v. Garcia* (1967) 250 Cal.App.2d 15, 18 [in prosecution for assault on police officers, voluntary intoxication instruction should have been given when a defendant testified he was too drunk to recognize they were police officers].)

person's power of perception, the accuracy of his deductions and the integrity of his memory may be greatly affected by his condition as to sobriety, is, of course, a matter of common knowledge and it will not be seriously controverted"]; *People v. Singh* (1937) 19 Cal.App.2d 128, 129 ["The law is settled in this state that it is proper to show, as affecting his capacity to observe, recollect, and communicate, that a witness was intoxicated at the time the event narrated occurred"]; *People v. Bagley* (1962) 208 Cal.App.2d 482, 487 ["There can be no doubt that the intelligence or mental condition of a particular witness, at least to the extent that it affects his powers of perception, memory or narration, may be properly considered by the jury"].) Much as the jury in *Wiidanen* should not have been precluded from considering that the defendant was too intoxicated to know that his statements to police were false, the jury in this instance should not have been precluded from considering that defendant inaccurately or inconsistently described events to police if he was intoxicated at the time of the events he attempted to describe.

We do not understand defendant to claim that he was any less responsible for his actions because of his intoxication. Penal Code section 29.4 puts such a claim off limits. As Justice Mosk stated in *People v. Mendoza*, the purpose of the statute is to disallow any argument that " '*I would not have done what I did*, and would not have possessed the mental state that I possessed, had I not been in the condition of voluntary intoxication.' " (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1135 (conc. opn. of Mosk, J.), italics added.) If the jury was allowed to consider that intoxication explained defendant's actions in leaving Ms. Irvin with Mike after he bloodied her nose or failing to take advantage of multiple opportunities to escape and report the crime to police, the jury might be led to view this evidence as showing that the murder itself would not have occurred if defendant had not been intoxicated. But, as Penal Code section 29.4, subdivision (a), provides, "[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition."

Next, defendant contends that CALCRIM No. 625 violates due process, claiming that it is overbroad and operates as a "blanket" prohibition on consideration of relevant evidence of voluntary intoxication beyond the circumstances specifically allowed. However, as mentioned, CALCRIM No. 625 accurately tracks the provisions of Penal Code section 29.4 and its predecessor section 22. Multiple courts, including recently the California Supreme Court, have considered and rejected a claim that this statute belongs to the category of prohibited evidentiary rules designed to exclude relevant exculpatory evidence. (*People v. Soto* (2018) 4 Cal.4th 968, 980-981; *People v. Carlson* (2011) 200 Cal.App.4th 695, 707-708; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1299-1300.) Section 29.4 is a legitimate exercise of the California Legislature's authority to define the elements of a crime, including the requisite mental state, and exclude evidence irrelevant to proof of that mental state. (See *Soto, supra*, at p. 981; *Montana v. Egelhoff* (1996) 518 U.S. 37, 57 [135 L.Ed.2d 361] (conc. opn. of Ginsburg, J.).)

Lastly, defendant contends that CALCRIM No. 625 goes beyond Penal Code section 29.4 in its final line that the jury "may not consider evidence of voluntary intoxication for any other purpose." We disagree. Defendant ignores that section 29.4, subdivision (b) provides that "[e]vidence of voluntary intoxication is admissible *solely*" on the issue of specific intent, premeditation, deliberation or express malice aforethought on a murder charge. (*Ibid.* (italics added).) A statute providing that evidence of voluntary intoxication may be considered "solely" for enumerated purposes and an instruction based on that statute that such evidence may not be considered "for any other purpose" constitute articulations of the same principle.

The Attorney General asserts that discussion of the merits of defendant's claimed instructional error is immaterial because defendant forfeited or waived the error when he did not object to CALCRIM No. 625, or request a clarification or modification of the instruction to address his consciousness of guilt theory. (*People v. Lee* (2011) 51 Cal.4th 620, 638; *Huerra v. Busby, supra*, 2014 U.S. Dist. LEXIS 103065, at p. *34 ["Huerra did

not object to [CALCRIM No. 625] as given, thus resulting in forfeiture of the argument"].)

Defendant does not dispute that he failed to object to the instruction as given or request a modification of the instruction below. Defendant asserts that CALCRIM No. 625 is nonetheless reviewable as an incorrect statement of the law or if it affected defendant's substantial rights. (Pen. Code, § 1259; *People v. Franco* (2009) 180 Cal.App.4th 713, 720; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.) The absence of language indicating that the jury could consider voluntary intoxication on consciousness of guilt does not necessarily make CALCRIM No. 625 an incorrect statement of the law. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1381.) Defendant argues that CALCRIM No. 625 is not a correct statement of the law, because it prohibited the jury from considering whether intoxication impaired his perception or memory or "considering whether his suspicious behavior could have been due to intoxication rather than guilt." "Instructional error affects a defendant's substantial rights if the error was prejudicial under the applicable standard for determining harmless error." (*Franco, supra*, at p. 720.)

Assuming a modification of CALCRIM No. 625 would have been appropriate, any instructional error was harmless. The Attorney General contends that defendant cannot establish prejudice under any standard, either *People v. Watson* (1956) 46 Cal.2d 818, 836 (more favorable outcome for a defendant reasonably probable absent error) or *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705] (harmless beyond a reasonable doubt).[8] We agree.

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[8] In *People v. Mendoza, supra,* 18 Cal.4th at pp. 1134-1135, the California Supreme Court applied the *Watson* standard, and did so again in *People v. Covarrubias* (2016) 1 Cal.5th 838, 897.

There was some evidence that defendant was inebriated. He testified that he had three cups of wine the night of the murder. Mr. Centeno saw him "tumbling"—which we understand as meaning "stumbling"—with his bike. Defendant, however, testified that he was not drunk that night. Plus, according to his own account, he obtained Ms. Irvin's car keys from her apartment, drove her car up to his apartment, loaded her body into the car with some difficulty, left her body by the dumpster, and drove to the 7-Eleven (after an initial wrong turn that he said he made because he was "nervous," not drunk). Moreover, he was able to give the store clerk a plausible explanation for having bloody knees and no shoes. His ability to accomplish these actions does not support the conclusion that he was significantly intoxicated at the time.

To be sure, defendant's ex-wife testified that his memory was impaired after drinking. But his memory of the events of the night of the murder, to which he testified in great detail, did not indicate substantial impairment due to intoxication. Rather, defendant offered an innocent explanation for everything he did that could otherwise appear suspicious, which reflects calculation, not confusion.

More significantly, the evidence supporting the jury's determination that defendant murdered Ms. Irvin was truly overwhelming. In addition to Ms. Sidhu's identification of defendant as the person running around Ms. Irvin's car, turning off the car alarm, and going back and forth from his apartment to the car—defendant had no explanation to defuse this testimony and simply called Ms. Sidhu a liar—the evidence included: Ms. Irvin's DNA under his fingernails; latex gloves in his bedroom with blood matched to Ms. Irvin; a double-bladed, serrated knife in his dishwasher with blood on it that was a DNA match for both Ms. Irvin and defendant, with more of her DNA on the blade and more of his DNA on the handle, and no third party DNA on the blade or the handle; and a folding knife in his apartment with Ms. Irvin's DNA on the blade and defendant's DNA on the handle. Defendant admitted he appears multiple times on video surveillance at the apartment complex on the night of the murder, but Mike, the person

defendant claims killed Ms. Irvin and compelled him to dispose of her body by a dumpster, is not seen once and there is no other evidence of any kind that any such person was ever there on that night.

Based on our review of the evidence, we conclude any error in failing to instruct the jury that defendant's memory in recounting the events may have been impaired by intoxication was harmless. Since the error was harmless, it could not have affected his substantial rights. (*People v. Franco, supra*, 180 Cal.App.4th at p. 720.)

3. CALCRIM No. 226

Defendant's next claim of instructional error involves CALCRIM No. 226 regarding witnesses, which we previously discussed. CALCRIM No. 226 as written instructs the jury in relevant part that: "In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have."

In orally delivering the instruction, the trial court elaborated: "In deciding whether testimony is true and accurate, use your common sense and experience. If you look at headlines, people think, we don't want them to do that in court. No, it's the opposite. Use your common sense and experience. You must judge the testimony of each witness by the same standard -- we talked about that -- setting aside bias or prejudice you may have."

Defendant asserts that the trial court's brief comment constituted a direction to the jury to consider headlines and public opinion, which denied his constitutional right to an impartial jury free of improper influence. Defendant posits that jurors would understand the comment to refer to high-profile acquittals that public opinion deemed contrary to common sense and as a directive to render a verdict "opposite" to those cases.

However, the trial court specifically instructed the jury *not* to be influenced by public opinion. The court delivered CALCRIM No. 200 which includes the following instruction: "Do not let bias, sympathy, prejudice or *public opinion* influence your

decision." (Italics added.) We presume that the jury followed this instruction. (*Wilson, supra*, 44 Cal.4th at p. 803.) Assessing the instructions as a whole and viewing CALCRIM No. 226 in context with CALCRIM No. 200, we are firmly persuaded that there is no reasonable likelihood that jurors applied CALCRIM No. 226 in an impermissible manner.

4. CALCRIM No. 302

Defendant raises another discrepancy between the written and oral versions of a jury instruction. The trial court provided the jury with a copy of CALCRIM No. 302 on evaluating conflicting evidence.[9] In delivering the instruction orally to the jury, the trial court interjected: "If you determine there's a conflict in the evidence -- and obviously there is here, okay -- you must decide what evidence, if any to believe. Both lawyers have said, it's not -- we don't want people who say, gosh, I don't know. Let's go to lunch and maybe it will be better when I come back. Huh-uh. Here's the evidence, okay."

Defendant also points to a comment on conflicting evidence that trial court made in orally instructing the jury with CALCRIM No. 226: "In this case, there's a vast divide between what [the prosecutor's] arguing and what [defense counsel] is arguing and between the evidence. So you alone must judge the credibility or believability of the witnesses. And that's why we ask you, do you got common sense, logic and reason from life's experience? Okay. Because if you don't, this is not for you, okay. And we don't want to do the case again because we just picked 12 people who don't get it, okay."

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[9] CALCRIM No. 302 as written provides: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any evidence convinces you, not just the number of witnesses who testify about a certain point."

Defendant maintains that the oral instructions were erroneous because the trial court's comments misled the jury that it was required to resolve conflicts in the evidence one way or the other and suggested that the case would need to be retried if they did not. We again reject defendant's claims regarding the oral version of jury instructions: jurors were given copies of the written instructions, the written instructions are controlling, and we presume that the jury followed the instructions as written. (*Wilson, supra*, 44 Cal.4th at pp. 803-804; *Grimes, supra*, 1 Cal.5th at p. 729; *People v. Edwards, supra*, 57 Cal.4th at p. 746.) Therefore, there is no reasonable likelihood that the jury applied CALCRIM No. 302 or CALCRIM No. 226 in an impermissible manner.

Moreover, the trial court's challenged comments, taken together, do not instruct the jury as defendant suggests. The trial court rather told jurors not to shrink from their obligation to determine what evidence, if any, to believe, and encouraged jurors that they were up to task, because in the jury selection process they confirmed that they had the common sense, logic, and life experience to do so.

Taking another tack, defendant urges us to find that CALCRIM No. 302 as written is erroneous. Defendant's theory is that where there is a conflict in the evidence, the jury must be convinced that inculpatory evidence is true beyond a reasonable doubt and exculpatory evidence is false beyond a reasonable doubt. Defendant argues that CALCRIM No. 302 does not reflect the presumption of innocence by treating conflicting inculpatory and exculpatory evidence equally.

Defendant acknowledges CALCRIM No. 302 has been upheld against multiple challenges but argues that defendant's specific argument was not raised in those cases. Not so. Defendant's claim is that the prosecution's burden of proof is implicated in CALCRIM No. 302, a proposition courts have rejected. In *People v. Ibarra* (2007) 156 Cal.App.4th 1174, the defendant posited "a conflict between the presumption of innocence and the admonition in CALCRIM No. 302 that the jury 'not favor one side or the other.' " (*Ibarra, supra*, at p. 1191.) The court's response was that CALCRIM

No. 302 "is impartial" and does not negatively impact the burden of proof. "The instruction mandates that the jury 'decide what evidence, *if any*, to believe,' regardless of which side introduces the evidence, but does *not* tell the jury to disregard the prosecution's burden of proof . . . ." (*Ibarra*, *supra*, at p. 1191 (italics added by *Ibarra*); see also *People v. Anderson* (2007) 152 Cal.App.4th 919, 939.)

The function of CALCRIM No. 302 is not to instruct the jury on presumption of innocence or the prosecution's burden of proof, but simply to guide the jury on what to do in the face of conflicting evidence: the jury "must decide what evidence, if any, to believe." CALCRIM No. 302 does not tell the jury to ignore the prosecution's burden of proof. CALCRIM No. 302 does not concern the burden of proof. As the California Supreme Court observed in *People v. Crew* (2003) 31 Cal.4th 822, 842, regarding a similar instruction, former CALJIC No. 2.22, "[t]his instruction addresses the jury's evaluation of evidence, not the burden of proof."

Defendant contends that former CALJIC No. 2.22 does not suffer from the same flaw defendant attributes to CALCRIM No. 302, because CALJIC No. 2.22 concludes with the statement that " 'the final test is not in the relative number of witnesses, but in the *relative* convincing force of the evidence.' " (Defendant's italics.) Defendant claims that the second reference to "relative" is a signal that the jury should regard inculpatory evidence as held to a higher standard than exculpatory evidence because of the prosecution's burden of proof. A better reading of this instruction is that the second use of the word "relative" regarding "convincing force of the evidence" merely contrasts a proper consideration in evaluating conflicting evidence with consideration of the "relative number of witnesses," which is not. In any event, defendant quotes an outdated version of CALJIC No. 2.22. In *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884, footnote 8, the court quoted CALJIC No. 2.22 as concluding with this sentence: " 'It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.' " The current version of CALJIC No. 2.22 concludes: "The final test is

not in the [relative] number of witnesses, but in the convincing force of the evidence." In *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1497, we held that "CALJIC No. 2.22 offers precisely the same guidance for weighing conflicting testimony" as CALCRIM No. 302. "Both instructions (CALCRIM No. 302 and CALJIC No. 2.22) emphasize that it is the convincing force of testimony, not the number of witnesses that is of critical importance." (*Reyes, supra,* at p. 1497.)

5. CALCRIM No. 301

Defendant contends that the trial court's comment in delivering CALCRIM No. 301 on the testimony of a single witness lessened the prosecution's burden of proof. The court read the written instruction and then said: "Just a brief comment on this -- not about this case. Oftentimes in child molest cases this will come up during jury selection. Hi, I'm the DA. My victim's four, okay. It happened in a basement with a babysitter. There are no witnesses. Can you trust a child's testimony and reach a verdict if you believe it? I don't know. It's just a kid, some people say I need more. Ma'am, there won't be more. Child molest doesn't happen in public. I don't know. Other people, different end of the spectrum. Well, if a child says it, I'll believe it. What do you mean? Oh, I mean, he's automatically guilty if the kid says it, because -- no. Okay. [¶] Testimony of a single witness. You look at the testimony, if you believe it, okay. If you believe the testimony of a witness, you can use that for proof of a fact. But those are the kinds of issues that come up in different kinds of cases, okay."

Defendant claims that the trial court's comment lessened the prosecution's burden of proof by focusing on the nature of the crime—i.e., a difficult-to-prove crime committed without direct witnesses other than the victim and the defendant—rather than the nature of the evidence, and thus gave the prosecution the benefit of the doubt in meeting the standard of proof beyond a reasonable doubt.

An accurate copy of CALCRIM No. 301 was provided to jurors and is the one "we presume the jury used." (*People v. Frazier, supra,* 128 Cal.App.4th 823, fn. 6; see also

Wilson, *supra*, 44 Cal.4th at p. 803; *Grimes*, *supra*, 1 Cal.5th at p. 729.) This is particularly true in this instance where the trial court prefaced his comments about child molestation cases with the statement "not about this case." Therefore, defendant cannot raise an issue regarding the court's oral version of CALCRIM No. 301.[10, 11]

Prosecutorial and Judicial Misconduct

Defendant contends that it was misconduct for the prosecutor to comment in closing argument that defense counsel, by arguing for a second degree murder conviction, conceded that defendant killed Ms. Irvin. Defendant adds that the trial court also committed misconduct by virtue of comments after the conclusion of rebuttal argument that attorneys "don't pick their cases. They are dealt the cards they get, and that's this

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[10] Having determined, with the exception of CALCRIM No. 625, that the trial court did not commit error in delivering any of the instructions defendant challenges on appeal, we need not reach the Attorney General's contention that defendant forfeited his instructional claims of error by failing to object at trial. (*People v. Williams* (2010) 49 Cal.4th 405, 468, fn. 9.)

[11] Our concurring colleague recognizes the well-established rule that where an accurate copy of an instruction is provided to jurors the written instructions are controlling; we presume the jury followed the instructions as written instead of oral modifications made by the court. He complains, however, that this rule only applies to "misstatements" and was never intended to include "intentional embellishments," such as those made by the trial court here. Our research has not disclosed such a scienter requirement. The question is not whether the court's misadvisement was inadvertent or intentional though misguided. The jury is unlikely to know what motivated the court, nor should it matter. The point is that where the jury is provided with an accurate written set of operating instructions, we presume the jury will follow them.

Contrary to the concurring opinion, the rule we apply here does not require us to ignore all oral embellishments or modifications by the trial court no matter how inaccurate or misleading they might be so long as accurate written instructions have been provided to the jury. One can postulate a case where a court's oral instructions are so grossly inaccurate and delivered with such impact that doubts would arise as to the curative power of the written instruction. As the concurring opinion recognizes, this is not our case.

case," giving the jury the impression that the judge did not believe defendant's testimony. Defendant contends defense counsel's failure to object both to the prosecutor's argument and the court's comment was excused because an admonition would not have cured the claimed misconduct, or, if an admonition would have been effective, defense counsel was ineffective for not requesting it.

In closing argument, defense counsel initially presented argument that the prosecution had not proved beyond a reasonable doubt that defendant was the person who killed Ms. Irvin, noting that defendant had testified that he didn't do it and reading CALCRIM No. 220 on reasonable doubt to the jury. Then defense counsel argued more extensively that, adopting the prosecution's theory that defendant committed the crime, the circumstantial evidence presented did not establish a premeditated homicide or torture beyond a reasonable doubt and the correct verdict should be second degree murder.

In rebuttal, the prosecutor stated: "Well, the Defense seems to be saying now, okay, he did it, but it's not murder, first degree, and it's not torture. And he was drunk. He didn't know what he was doing. She provoked him. She started it. And he slit her throat first and it happened in a matter of moments. That's basically the Defense in summary. And not one of those points is true."

The prosecutor proceeded to discuss the points made by defense counsel and argue that the evidence was to the contrary. Towards the end, the prosecutor summed up his rebuttal, stating: "It's the Defendant and his testimony that you shouldn't believe a syllable of what he said. That, I think, is an accurate way to describe that concept. And it sounds like that is what the Defense is almost conceding in their argument by not even saying he didn't do it. So I said yesterday you're going to spend ten or 15 minutes and conclude, I think you'll spend one minute, because it's almost conceded -- not technically conceded, but it sounds like it's for the most part conceded."

After the prosecutor's rebuttal argument concluded, the court commented: "Thanks to both gentlemen. Also, I want to thank them for their time and their

professionalism throughout the case. We don't mention that enough. They don't pick their cases. They are dealt the cards they get, and that's this case. So that's their job as advocates, to present the evidence. They've done that."

We find no prosecutorial or judicial misconduct.

"[I]t is . . . improper for the prosecutor to argue to the jury that defense counsel does not believe in his client's defense. [Citations.]" (*People v. Thompson* (1988) 45 Cal.3d 86, 112 (*Thompson*); *People v. Bell* (1989) 49 Cal.3d 502, 537.) "There is no inconsistency in denying that an accused was the perpetrator of an offense while simultaneously arguing that no matter who committed it the crime was not premeditated. . . . [D]efense counsel's personal belief in his client's guilt or innocence is no more relevant than the belief of the prosecutor. [Citation.]" (*Bell, supra*, at pp. 537-38.)

In this case, however, the prosecutor said nothing about defense counsel's personal beliefs. His remark was an introduction to his rebuttal argument in which he sought to refute the evidence that defense counsel had highlighted to persuade the jury that the crime, if committed, was not premeditated nor did it involve torture.

There is a parallel here to *Thompson* where the California Supreme Court noted that the prosecutor argued "that defense counsel would not spend a lot of time asking the jury to believe defendant's version of events, because defendant's version was that he slept through the whole thing. The prosecutor's focus was thus on the evidence and his contention that the defense case was simply unbelievable." (*Thompson, supra*, 45 Cal.3d at p. 113.) The prosecutor in this case also focused on the evidence, detailing in rebuttal the actions defendant admitted, as well as reasonable inferences from the circumstantial evidence, to show defendant's actions were deliberate.

On the other hand, "[t]hat is not to say that the prosecutor did not venture onto dangerous ground in phrasing his remarks as he did." (*Thompson, supra*, 45 Cal.3d at p. 113, fn. 20.) Assuming that the prosecutor did cross an ethical line, courts have repeatedly held that a challenge to improper remarks by the prosecutor is waived by a

failure to object, as here. (*People v. Bell, supra*, 49 Cal.3d at p. 539 ["The impropriety was one that could have been offset by an instruction or admonition by the court, and thus the claim is one that must be deemed waived by the failure to object"]; *People v. Chatman* (2006) 38 Cal.4th 344, 385 ["Because [defendant] did not object, this claim is not cognizable"]; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1338 ["Because defendant did not interpose timely and specific objections to the improper argument, the errors were not preserved for appeal"]; *Thompson, supra*, 45 Cal.3d at p. 114 ["Defendant grossly exaggerates the impact, if any, of the prosecutor's remark, and our cases do not suggest that this sort of error may not be . . . cured [by admonition]"].)

As for the trial judge's brief comment, we find no conceivable misconduct. "A trial court commits misconduct if it ' "persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge." ' [Citations.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1238.) Nothing of the kind occurred here. The trial judge did the opposite: he was exceedingly courteous, thanking both counsel and complementing them on their professionalism in presenting the evidence. Defendant focuses on the comment that counsel "are dealt the cards they get", but this characterization was directed at both counsel. This contention by defendant is without merit.

Moreover, isolated instances of claimed judicial misconduct are subject to the objection requirement or they are forfeited. (*People v. Houston* (2012) 54 Cal.4th 1186, 1220; *People v. Seumanu, supra*, 61 Cal.4th at 1320.) And even if the issue was preserved for appeal by a timely objection, "the trial court's single, fleeting, and ambiguous interjection could not have prejudiced defendant in any way." (*Seumanu, supra*, at p. 1321.)

Finally, we reject defendant's claim that defense counsel was ineffective in failing to object to the prosecutor's and the court's claimed misconduct. To prevail on such a

claim, defendant must establish not only deficient performance but also resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674]; *People v. Davis* (1995) 10 Cal.4th 463, 503.) The overwhelming evidence supporting defendant's conviction precludes the prejudice required to establish that counsel was ineffective. As mentioned, the prosecution presented extensive witness, video, DNA, and other forensic evidence connecting defendant to the charged crimes and establishing his guilt. Defendant offered an identification defense in testimony rife with inconsistencies that posited an alternative perpetrator who left no trace in the process of committing a brutal and bloody homicide. Defendant cannot show prejudice.

Credit for Time Served in Custody

Defendant argues that he is entitled to an additional day of custody credit for the day of his arrest. Defendant was arrested on May 1, 2012, but not booked into jail until May 2, 2012. He received credit from the date he was jailed but contends he should have received credit from the day he was arrested.

A defendant is in custody and entitled to credits for "any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution . . . ." (Pen. Code, § 2900.5, subd. (a).) In *People v. Ravaux* (2006) 142 Cal.App.4th 914, the court observed that "[a]rrest or detention by police prior to booking is not mentioned anywhere in section 2900.5," and concluded that "[i]t is clear from the plain language of the statute that custody credits are to be given for time spent within a residential detention facility, not for merely being in the custody of police." (*Id.* at pp. 919-920; see also *People v. Macklem* (2007) 149 Cal.App.4th 674, 702 ["credit for time served commences on the day a defendant is booked into custody"].)

Penal Code section 2900.5 was adopted for the dual purpose of eliminating unequal treatment of the indigent, who are confined longer than the wealthy because of

their inability to post bail, and to equalize the actual time served in custody for various offenses. (*People v. Ravaux, supra*, 142 Cal.App.4th at p. 920.) "There is none of the unequal treatment this statute was directed at during a period of prebooking detention because all felony defendants, whether they post bail or not, are likely to be arrested and detained prior to being booked into jail." (*Ibid.*) Further, adopting defendant's view would introduce ambiguity into the credit calculation since a defendant may be detained and questioned by police multiple times and credit is given for a portion of a day in custody. (*Id.* at p. 921.) "By contrast, the booking of a suspect into jail represents a bright line for trial courts to begin counting credits." (*Ibid.*)

Defendant cites a number of cases that include a single sentence referring to custody credit beginning on the day of arrest, none of which engaged in analysis of the language and purpose of Penal Code section 2900.5, subdivision (a), as did the court in *Ravaux*. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469; *People v. Williams* (1992) 10 Cal.App.4th 827, 831; *People v. Heard* (1993) 18 Cal.App.4th 1025, 1027.) We find *Ravaux* on point and decline defendant's invitation to revisit that authority.

Defendant also relies on language in section 2900.5 stating that time in custody "include[s], but [is] not limited to" the custodial examples enumerated. (Pen. Code, § 2900.5, subd. (a).) However, the reference to "similar residential institution[s]" following the list of custodial arrangements precludes credit prior to placement in such a setting.

Defendant was given credit for his time "in custody" within the meaning of the term in Penal Code section 2900.5. He is not entitled to credit for the day of his arrest prior to booking into jail.

Parole Revocation Fine

The trial court imposed a parole revocation fine under Penal Code section 1202.45 even though defendant was sentenced to life without the possibility parole. "When there is no parole eligibility, the fine is clearly not applicable." (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) Section 1202.45 states that the fine is imposed only where the sentence includes "a period of parole." (*Oganesyan*, *supra*, at p, 1183; see also *People v. Cardona* (2016) 246 Cal.App.4th 608, 612, fn. 3.) The Attorney General concedes as much.

The fact that defendant received a one-year weapon enhancement does not support the fine because an enhancement is not separate crime subject to a period of parole. (Compare *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 [a parole revocation fine may be imposed where defendant is sentenced to life without parole and a determinate term under a statute that includes a period of parole].)

We order the fine stricken and the judgment so modified. (*People v. McWhorter* (2009) 47 Cal.4th 318, 380.)

DISPOSITION

The judgment is modified to strike the parole revocation fine imposed under Penal Code section 1202.45 and in all other respects affirmed.

RAYE, P. J.

I concur:

HOCH, J.

Murray, J., Concurring.

I concur in the majority opinion but write separately concerning application of the rule that written instructions control when misstatements are made in orally instructing the jury. The majority opinion expands that rule to include intentional embellishments such as those made by the trial court here. In my view, the rule was never intended to apply to such situations.

I do not mean to imply that CALCRIM instructions are sacrosanct and a trial court may never modify them; trial courts are free to do so. But when a court does modify an instruction by orally adding to it like the trial court did here, we must review the modification to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. We cannot simply rely on the written instructions, because such an expansion of the rule allowing for leeway when a court misspeaks would require reviewing courts to ignore all oral embellishments or modifications by the trial court no matter how legally inaccurate or misleading they might be as long as accurate written instructions have been provided to the jury.

I. Mistaken Misstatement vs. Intentional Embellishment

The majority cites four cases: *People v. Grimes* (2016) 1 Cal.5th 698 (*Grimes*); *People v. Edwards* (2013) 57 Cal.4th 658, 746 (*Edwards*); *People v. Wilson* (2008) 44 Cal.4th 758 (*Wilson*), *People v. Frazier* (2005) 128 Cal.App.4th 807, 823, fn. 6 (*Frazier*). All involve mistaken misstatements in oral instructions.

In *Grimes, supra,* 1 Cal.5th 698, the trial court misread the felony-murder special circumstance instruction for aider and abettors, substituting the word "whether" for "when." (*Id*. at pp. 728-729.) The court orally instructed the jury that " '[a] defendant acts with reckless indifference to life *whether* [he] knows or is aware that his acts involve

a grave risk of death to an innocent human being.' " (*Ibid*.) The defendant contended the instruction misstated the law because the substitution of "whether" indicated to the jury that reckless indifference could exist *whether or not* defendant knew his acts caused a grave risk of death. (*Id*. at p. 729.) Rejecting the defendant's argument, our high court focused on the fact that the jury was provided accurate written instructions, reasoning that " '[t]he risk of a *discrepancy* between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by *the mere fact the trial court misspoke*.' " (*Ibid*., italics added, quoting *People v. Mills* (2010) 48 Cal.4th 158, 200 (*Mills*).) The court continued, " '[W]e often have held that when erroneous oral instructions are supplemented by correct written ones, we assume the jury followed the written instructions, particularly when, as here, the jury is instructed that the written version is controlling.' " (*Grimes,* at p. 729.) In *Mills,* in a part of the opinion entitled "Misreading Jury Instructions," our high court noted the trial court "misspoke" on three occasions when orally instructing the jury. (*Mills,* at p. 200.) The court characterized each as a "mistake," and applied the rule that the written instructions control. (*Id*. at pp. 200-201.)

Similarly, in *Edwards, supra,* 57 Cal.4th 658, the trial court omitted the word " 'living' " from the torture-murder and torture-murder special-circumstance instructions. (*Id*. at p. 746.) Our high court observed that both the prosecutor and defense counsel read the instructions properly to the jury during closing argument. (*Ibid*.) And after the court's instructions, defense counsel told the court he did not recall hearing the word " 'living,' " but indicated he was satisfied so long as " 'living' " appeared in the written instructions. (*Ibid*.) Accurate written instructions were provided to the jury. (*Ibid*.) Our high court again applied the rule that the written instructions control and concluded there was "no 'reasonable likelihood the jury applied the challenged instruction[s] in an impermissible manner.' " (*Ibid*.)

In *Frazier, supra,* 128 Cal.App.4th 807, in orally instructing the jury, the trial court said " 'housing, health *and* safety of that person,' " instead of "housing, health *or* safety of that person." (*Id.* at p. 823, fn. 6.) The *Frazier* court found no prejudicial error because accurate written instructions were provided to the jury. (*Ibid.*)

Finally, in *Wilson, supra,* 44 Cal.4th 758, the trial court orally instructed the jury that the torture-murder special circumstance allegation requires a finding that " '*[t]he defendant* intended to inflict extreme cruel physical pain and suffering . . . .' "; the written instruction provided to the jury stated the element as, " '*a defendant* intended to torture . . . .' " (*Id.* at pp. 802-803.) The defendant maintained that "small discrepancy" was critical because other people were involved in the crime, one of whom was jointly tried with the defendant. (*Id.* at p. 803.) He argued the instruction allowed the jury to find the special circumstance true as to him without finding he personally intended to torture the victim, so long as the jury believed one of his confederates harbored the requisite intent. (*Ibid.*) While recognizing the rule that written instructions control, our high court concluded that it was actually the *written* instructions that were "technically erroneous," because the torture-murder special circumstance requires proof that the defendant himself intended to torture the victim. (*Id.* at pp. 803-804.) The court, nevertheless, found the error harmless. (*Id.* at p. 804.)

While no court has expressly limited application of the rule that written instructions control to situations where the trial court misspoke in reading the instructions, our research has revealed no cases where an appellate court has previously applied the rule to intentional oral embellishments or expansions of standard instructions. Instead, all of the cases upon which the majority relies involve mistakes in the oral delivery of instructions. There is good reason to apply the rule in such situations. As these cases impliedly recognize, judges are human; hence, "in every trial" there is a " 'risk of a discrepancy between the orally delivered and the written instructions,' " but

" 'verdicts are not undermined by *the mere fact the trial court misspoke*.' " (*Grimes, supra,* 1 Cal.5th at p. 729; *Mills, supra,* 48 Cal.4th at p. 200, italics added.)

But this is not a case where the trial court merely misspoke. The embellishments here were intentional and expanded upon the standard instructions.[12] Thus, our review must focus on whether there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. On this point, I agree with the majority. There is no such reasonable likelihood here.

II. CALCRIM No. 220—Reasonable Doubt Instruction

As for the trial court's comment that a "lasting conviction" is not one upon which a juror makes up her mind at "two minutes to 4:00" and "might" change it by "4:10," I agree with the majority that the court's embellishment, as a whole, told the jurors that their decision must be "lasting." I further agree that "lasting" is a synonym for "abiding" and is commonly defined—meaning permanent, durable, stable, i.e., "enduring so long as to seem fixed or established." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 702.) The instruction did not set a temporal parameter for how long the jurors' conviction must last. Indeed, in my view, both parties misunderstand the court's comment. The court's focus was not the duration of a juror's conviction but the time of day the juror arrived at a decision.

A review of the clerk's minutes reveals the court customarily adjourned the trial at 4:00 p.m. The jurors obviously knew this. In my view, when the court said, "two minutes to 4:00," it was telling the jury not to make a decision simply because that is how they feel at the end of the court day when their conviction was so weak that they might

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[12] Indeed, the trial court characterized its discussion about the word "abiding" in CALCRIM No. 220 as an "expansion," prefacing its comments with: "the only *expansion* would be, well, what's abiding?" (Italics added.)

change their mind later. I submit this is probably how the jury understood the court's instruction and it appears defense counsel did, because he made no objection.

In any event, considering the instructions as a whole, there was not a reasonable likelihood the jury applied the challenged instruction in the way suggested by the defense.

III. CALCRIM No. 301—One Witness Instruction

The trial court instructed using CALCRIM No. 301: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." The court then went on to provide additional commentary as set forth in the majority opinion. (Maj. opn., *ante,* p. 31.)

I find the trial court's discussion about the one witness instruction in child molestation cases problematic—not for the reason defendant asserts on appeal—but because it has nothing to do with this case. Trial courts must not give instructions that are unrelated to issues raised by the evidence. (See *People v. Saddler* (1979) 24 Cal.3d 671, 681.) And here, while the one witness instruction was appropriate because defendant's defense depended solely on his testimony, the discussion about child molestation cases had no relevance in this case.

The prosecution's case was not one that was based on the testimony of a single witness, and given the nature of the prosecution's evidence—multiple witnesses, DNA, defendant's statements, etc.—the court's unnecessary embellishment is harmless under any standard of prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24 [the error is harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [it is

not reasonably probable that defendant would have obtained a more favorable result in the absence of the error].)[13]

MURRAY, J.

[13] As defendant acknowledges, the trial court's embellishment was designed to inform the jurors that it would be wrong to reject the testimony of a single witness based solely on the idea that the juror would "need more" evidence, and on the other hand, it would be wrong to automatically accept the testimony of one witness. Because the defense case was based solely on defendant's testimony and the prosecution's case was based on far more than a single witness, this instruction related more to the defense than the prosecution. Given that the court emphasized that the jury should not reject the testimony of a single witness and the testimony of a single witness who you believe is sufficient to prove a fact, the court's instruction and embellishment may have actually inured to defendant's benefit. In any event, nothing the court said lowered the prosecution's burden of proof.